

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7386

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE MASTER KEY ANTITRUST LITIGATION
(All Cases)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANTS-APPELLANTS



WALTER A. BATES
JOHN W. BARNETT
CHARLES DONELAN

Attorneys for Defendants-Appellants

ARTER & HADDEN
1144 Union Commerce Building
Cleveland, Ohio

WIGGIN & DANA
195 Church Street
New Haven, Connecticut

BOWDITCH & LANE
311 Main Street
Worcester, Massachusetts

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

In their brief, plaintiffs continue to assert that the orders entered by the District Court were based upon its review of the "evidence", seeking to argue thereby that such orders were merely procedural determinations of the sort typically entrusted to the discretion of the trial court. (Plaintiffs' Brief, pp. 7, 10, 17) Plaintiffs' assertions ignore the fundamental determination of law upon which each of the orders below was premised, i.e., that generalized proof of impact is sufficient to establish "liability" to each plaintiff in this private treble-damage litigation. If any doubt existed that Judge Blumenfeld's May 27, 1975, Ruling (Joint Appendix, pp. 152A-163A) was premised upon that determination of law rather than upon the collection of assertions and allegations which plaintiffs seek to characterize as evidence, it has been dissipated by his Ruling on Motion for Certification of Interlocutory Appeal (Joint Appendix, pp. 164A-169A, at pp. 165A-166A):

The first question that the defendants seek to have certified is whether particularized "impact" must be shown as an element of establishing liability. Cf. 15 U.S.C. § 15. The defendants' argument was rejected in the May 27 ruling, which held that a generalized showing of injury was sufficient. If the defendants are correct, the validity of two conclusions necessary for the class certifications entered--that common issues predominate over individual issues and that trial of the case as a class action would be manageable--would be open to serious question. Cf. Ungar v.

Dunkin' Donuts of America, Inc., 1975 Trade Cases ¶ 60, 361, at 66, 537 (E.D. Pa. Apr. 8, 1975). In addition, the utility of separate trials of liability and damage issues would be nil, as explained on pages 10-11 of the ruling of May 27.

Nevertheless, plaintiffs seek by their misleading statement of the issues presented by this appeal (Plaintiffs' Brief, p. 2) and elsewhere throughout their brief, to divert the attention of this Court from that difficult question of law in order to avoid squarely coming to grips with it. Defendants will here briefly respond to that effort.

I. THE ORDERS BELOW ARE APPEALABLE FINAL ORDERS UNDER 23 U.S.C. §1291

Plaintiffs-appellees, at pages 10-18 of their brief, renew their motion to dismiss the present appeal on the ground that the orders appealed from are not final orders, which motion was denied without prejudice by this Court on September 2, 1975. Since the issues raised by that motion have previously been briefed by the defendants, (Brief of Defendants-Appellants in Opposition to Motion to Dismiss Appeal, filed August 28, 1975) no purpose would be served by a lengthy reply with respect to those issues. Accordingly, defendants invite the attention of the Court to the discussion of those issues set forth in their August 28, 1975 brief, and renew their opposition to plaintiffs' motion by incorporating by reference herein the authorities and arguments presented in that brief. Matters raised with

respect to those issues by plaintiffs' brief which warrant further comment will be discussed briefly below.

A. Review of the Order Designating Classes is Separable from the Merits of the Litigation.

The language of the District Court quoted above also underscores the fallacy in plaintiffs' argument that review of the order designating classes would impermissibly take this Court into the merits of the litigation. (Plaintiffs' Brief, pp. 12-13) The District Court did not weigh common issues versus individual issues and conclude that there existed a statistical predominance of common issues. Instead, it acknowledged the existence of individual issues but ruled as a matter of law that it need not be concerned with such issues for purposes of a trial of "liability". That "finite and conclusive determination of judicial power," General Motors Corporation v. City of New York (C.A. 2 1974) 501 F. 2d 639, 647, is clearly separable from the merits of this litigation and is entitled to review by this Court now.

B. Defendants Will Be Irreparably Harmed By the Orders of the District Court.

With respect to the issue of irreparable harm, plaintiffs argue that such harm cannot exist because the orders appealed from might be reviewed following a judgment

on the merits. Such an argument, however, totally ignores those factors of irreparable harm which this Court has consistently recognized in sprawling class actions such as the present litigation, and which have previously been discussed at pp. 32-36, and 44-47 of defendants' Brief in Opposition to Motion to Dismiss Appeal. Plaintiffs argue, in effect, that no order designating classes, consolidating cases, or separating issues would ever be appealable under any circumstances, since those orders might ultimately be subject to review at some later point in time. As even those cases relied upon by plaintiffs make indisputably clear, however, that is simply not the law in this Circuit. The spectre of irreparable harm, particularly when the cumulative effect of the orders appealed from is considered, is apparent in this massive litigation.

C. The Orders Consolidating Cases and Separating Issues are Appealable Final Orders.

On the basis of the authorities previously discussed at pp. 38-48 of their Brief in Opposition to Motion to Dismiss Appeal, defendants submit that the orders consolidating cases and separating issues are appealable. With respect to the general language to the contrary cited by plaintiffs from 9 Moore's Federal Practice ¶ 110.13 [8] (1973 ed.), and 9 Wright & Miller, Federal Practice & Procedure, § 2392 (1971 ed.), two observations are in order: (1) In

each instance, that language was written prior to the decision of this Court in Garber v. Randell (C.A. 2 1973) 477 F. 2d 711; and (2) That language does not correctly state the law in this Circuit. It is clear, in fact, that such orders are appealable if they fall within the area of collateral orders set out in Cohen v. Beneficial Industrial Loan Corp. (1949) 337 U.S. 541. Garber v. Randell, supra, at p. 715.

Levine v. American Export Industries, Inc. (C.A. 2 1973) 473 F. 2d 1008, cited by plaintiffs, is not to the contrary. That case held only, on its particular facts, that an order consolidating cases for pretrial purposes did not satisfy the test of Cohen. Where, as here, the orders complained of go beyond the permissible objectives of convenience and expediency, "to deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result," Garber v. Randell, supra, at p. 716, they are plainly appealable.

Turning then to the merits of this appeal---

II. PLAINTIFFS' ENTIRE ARGUMENT ON THE MERITS AVOIDS THE PRECISE LEGAL ISSUE HERE PRESENTED

Plaintiffs' statement of the "issues" herein is drawn as though the questions were matters solely within

the discretion of the District Court. The issue is unfortunately far more complex than that.

Rather than a simple matter resting within the sound discretion of the trial court, this court must consider the separate and cumulative effects of all the District Court's orders---specifically in the light of the District Court's final determination that all such orders are bottomed on a "generalized showing of injury." Hence, the rulings of the District Court are intrinsically woven into that court's whole fabric for disposition of these cases by a trial of violation alone, to be followed by hundreds, if not thousands of "mini trials" to compute damages. The essential ingredient of proof of individualized impact to establish liability for such antitrust violation is wholly omitted under the scheme urged on the District Court by plaintiffs.

Thus, it is clear that---

---The issue is not class determination alone.

The citations at pp. 19-20 of plaintiffs' brief are not particularly helpful. Two citations¹ are unreported "orders" included neither in the Joint Appendix nor in the Record on Appeal. Two additional citations² are simply case names without even reference to an "order".

1. State of Connecticut v. General Motors Corp., M.D.L. Docket No. 65 (N.D. Ill., Order of January 24, 1973) and Gypsum Wallboard Antitrust Litigation, No. 46414-A (N.D. Cal., pretrial Orders No. 32 and No. 34, July 14, 1972 and November 28, 1972)

2. Cast Iron Pipe Antitrust Cases, C.A. No. 71-516 (N.D. Ala., August 24, 1971) and State of Connecticut v. General Motors Corp., M.D.L. Docket No. 65 (N.D. Ill.)

One citation³ is to a settlement and as Chief Judge Augelli remarked in City of Philadelphia v. American Oil Company (D. N.J. 1971) 53 F.R.D. 45, referring specifically to the case cited by plaintiffs (p. 71):

"It must be kept in mind that the Court is dealing with a class action in litigation. Precedent involving settlements are of little value when envisaging the problems involved in a litigation context."

In passing, it should be pointed out that none of plaintiffs' cases was tried to judgment.⁴

None of the remaining cases cited by plaintiffs in support of class determination herein dealt even remotely with the question whether classes could be certified--subject to decertification--on the basis that plaintiffs need not prove all the requisites of § 4, injury, impact and damages.⁵

By the same token---

---The issue here is not consolidation alone.

The issue of defendants' appeal of consolidation for trial of 19 cases is dealt with at pp. 2 to 5 supra and

3. State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F. 2d 1079 (2d Cir. 1971), cert. denied, 404 U.S. 871 (1972)

4. The trial in the Cast Iron Pipe Antitrust Cases resulted in a hung jury.

5. State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969) (Children's Books), cited in support of certification of national classes for public and private builders, dealt solely with libraries, school districts and boards of education which actually purchased the books.

in defendants' Brief in Opposition to Plaintiffs' Motion to Dismiss. The only additional point to be made here is that consolidation is also premised on the District Court's formula for generalized showing of injury and upon that premise, that ruling cannot stand.

Finally, and most important,

---The issue here is not separation of issues alone.

Defendants do not here contest the applicability of Rule 42 to separation of issues in appropriate circumstances. For example, in airline accident cases, the defendant's liability for the airplane crash can be separated and tried without reference to the injury or death of the passenger. Except in possibly unusual circumstances, causation of such injury or death has no relevance to the airline company's liability for the crash of the plane.

Similarly, issues in patent validity and infringement cases may suitably be severed. See cases cited at 5 Moore's Federal Practice ¶ 42.03.

Separation of issues in the antitrust context, however, involves far different considerations than in tort, patent or even Securities Act cases. Defendants sought to emphasize those differences and distinctions in the section of their brief in chief entitled "Liability and Damage Issues May Not Be Separated Where Such Issues are Inextricably Interwoven" pp. 28-31 and "The Peculiarities of Marketing of Contract Hardware Do Not Permit Trial By Methods Appropriate to Other Cases" pp. 31-34.

The overriding distinction in antitrust cases is the well established necessity that plaintiffs prove the impact of defendants' alleged violation and the translation of that impact into damage to each plaintiff. The District Court's rulings simply wipe out this distinction as though plaintiffs were claiming injury from an airplane crash.

The cases cited at pp. 21-23 of plaintiffs' brief do not consider, much less support, a generalized showing of injury as claimed by plaintiffs. In dealing with objections to class determination in Aamco⁶ Judge VanArtsdalen's discussion of liability nowhere excluded individualized proof of impact.

Nor does Barr⁷ support a generalized damage theory. Plaintiff-Barr claimed defendant illegally fixed the price of its telephone answering service to a class of 44,000 subscribers. Such a case---as well as Wainwright⁸ where the alleged price fixers sold directly to plaintiffs---is a far cry from the case here where plaintiffs never bought defendants' products but instead purchased buildings containing contract ~~lift~~ware installed by general contractors who purchased the product from distributors who purchased from defendants.

In City of Philadelphia v. American Oil Company⁹ Chief Judge Augelli certified classes of taxi cab companies,

6. Aamco Automatic Transmissions, Inc. v. Tayloe, 1975 Trade Cases ¶60,300 at p. 66,189 (E.D. Pa. 1975)

7. Barr v. WUI/ , Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975)

8. Wainwright v. Craftco Corp., 54 F.R.D. 532, 534-535 (N.D. Ga. 1972)

9. 53 F.R.D. 45, 67-68 (D. N.J. 1971)

bulk buyers and governmental entities. Plaintiffs sought an additional class of "nongovernmental users," arguing that they need establish only "liability and a general level of damages." (53 F.R.D. 71) The court rejected this argument and denied class certification.

Sommers¹⁰ was a tax escrow class action wherein Judge Newcomer felt that the issues of conspiracy, unreasonableness and impact were common to the class of mortgagors claiming interest on tax and insurance prepayments. The court, however, acknowledged (p. 591):

"If we decide that coercion is an element of plaintiffs' case, then individual questions would predominate over common ones, and certification under (b) (3) for this claim would be inappropriate."

Gardner v. Awards Marketing Corp., (D. Utah 1972) 55 F.R.D. 460 cited at plaintiffs' brief, p. 21, does not add water to plaintiffs' wheel. There, as appears at 55 F.R.D. 462, footnote 1, the issue of liability was severed from the determination of the amount of damages without objection by counsel.

Of some significance, however, is an earlier decision in the same litigation, Gold Strike Stamp Company v. Christensen (C.A. 10 1970) 436 F.2d 791, a mandamus action seeking to stay Judge Christensen's class action order. Judge Hill, writing for Judges Seth and Holloway noted (p. 796):

"In previous 23(b) (3) antitrust cases it appears that a dichotomy has arisen where the question of liability is established by common issues and where the question of liability depends upon the determination of individual issues."

10. Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n., 55 F.R.D. 581, 591-592 (E.D. Pa. 1975)

Judge Hill pointed out that in Chicken Delight v. Harris (C.A. 9 1969) 412 F.2d 830 the Ninth Circuit found that a class action was not appropriate because individual examinations would be required involving the question of liability. Similarly, in Moscarelli v. Stam (E.D.N.Y. 1968) 288 F. Supp. 453 an individual examination involving each class member was required before a decision of violation or liability could be established.

Gardner stands for nothing more than that trial issues can be separated by agreement of counsel---far from the case here.

Also misleading is plaintiffs' reference (Plaintiffs' Brief pp. 21-22) to Western Liquid Asphalt Cases (C.A. 9 1973) 487 F.2d 91 cert. denied (1974) 415 U.S. 919. The question before the Court (Circuit Judges Carter and Goodwin and District Judge Fergusen) was an interlocutory appeal under §1292(b) from an order of the District Court granting partial summary judgment to defendants-appellees on the ground that plaintiffs may not use "passing on" as a theory of recovery. No question of separation of issues was before the Court and indeed Judge Carter, the Court's spokesman, noted that antitrust actions would continue to be limited by (p. 200):

"the usual rules of law relating to proof of causation and damages."

The Court's opinion was concerned with Hanover Shoe, Inc. v. United Shoe Machinery Corp. (1968) 392 U.S. 481 from which case Judge Carter drew the conclusion (p. 196 n.5):

"It may be that the Supreme Court has ruled out generalized damages claims."

Nor can plaintiffs be assisted by the Gypsum Wallboard Antitrust Cases, cited at pp. 22-23 of their brief. Those cases involved six dealers (not purporting to represent any class) who purchased wallboard directly from manufacturers, and the initial trial was not limited to liability as plaintiffs claim but to liability and "impact".

A decision-by-decision, holding-by-holding analysis of plaintiffs' cases would unduly---and unnecessarily---extend this brief. None of the plaintiffs' cases departs from well established precedent that impact is an important and essential element to establish liability. Stated another way, without a showing of impact, there can be no liability for antitrust violation.

Plaintiffs' cases stand for no more than this principle and clearly---

III. Plaintiffs' Authorities Do Not Support A "Generalized Showing of Impact"

The District Court framed the precise issue for determination here in its "Ruling on Pending Motions" (Jt. App. pp. 152A-163A) and "Ruling on Motion for Certification of Interlocutory Appeal" (Jt. App. pp. 164A-169A).

The District Court's ruling was that a generalized showing of injury rather than particularized impact was sufficient to establish this element of liability.

Plaintiffs make no effort whatever to support this ruling. Plaintiffs' lone reference to "generalized showing of impact" (Plaintiffs' Brief, p. 28) rests on Bray.¹¹

Observe---

---Bray was not a class action.

Bray was brought by "a number of cattlemen" against three retail grocery chains for horizontal price fixing. A motion for maintenance of a class action was denied in Bray v. Safeway Stores, Inc. (N.D. Cal. 1975) 1975 Trade Cases ¶60,194. This is not to suggest that the rule requiring proof of impact in a class action is different than in a case brought by a single party plaintiff. Indeed, an important point to be mindful of is that Rule 23 changed none of the substantive rules of law. A multiplicity of plaintiffs---whether 20 or 20,000---neither relaxes nor lessens one tittle the burden cast on any plaintiff to prove his case.

Observe also that---

---Bray involved no separation of issues.

11. Bray v. Safeway Stores, Inc., 1975-1 Trade Cases ¶60,193 (N.D. Cal. 1975)

The issues in Bray were presented to the jury in a six week trial and that jury determined violation of law, impact and damages. In ruling on defendant's motion for judgment or for new trial, Judge Carter discussed damages and proximate cause, saying (p. 65,665):

"The defendant is unquestionably correct when it states that '. . . Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.' Hawaii v. Standard Oil Co. [1972 Trade Cases ¶73,862], 405 U.S. 251, 252-3 (1972). The plaintiffs, in order to recover, must prove a causal connection between the violation and the injury; additionally the plaintiffs must be in the 'target area' of the conspiracy. Contreras v. Grower Shipper Vegetable Association [1973-2 Trade Cases ¶74,700], 484 F.2d 1346 (9th Cir. 1973)."

Far from "generalized showing of impact," the court in Bray reviewed the detailed evidence presented by plaintiffs that defendant's violation of the law caused actual, real, measureable injury to plaintiffs.

Defendants here contend that plaintiffs have no less burden than that imposed in Bray---to prove violation of law which directly caused injury to a plaintiff in the target area.

One final point should be noted---

IV. Ultimate Consumers Who Are Not Purchasers May Be Denied Standing to Recover Damages

For reasons not wholly explained, plaintiffs make a persistent effort to cast themselves in the role of purchasers.

This effort flies in the face of admissions in the record.
(Jt. App. pp. 103A and 128A, and Transcript of Pretrial
Hearing, Feb. 26, 1973, pp. 6-7).

The characterization of plaintiffs as "purchasers"---
although pervasive¹²---must not be allowed to mislead the court.
Plaintiffs erected buildings pursuant to construction contracts
let for public bidding by general contractors. The general
contractors incorporated into such buildings builders hardware
purchased from contract hardware dealers who had in turn
purchased the hardware from many different builders hardware
manufacturers, including, but not limited to, defendants.

No plaintiff purchased contract hardware from the
general contractor; nor from the contract hardware dealer; nor
from any defendant. There can be no disagreement as to these
facts.

12. "... liability of defendants to all class members who
purchased contract hardware. . ." Plaintiffs' Brief p. 24.

"... in cases brought by purchasers alleging a conspiracy
to fix prices. . ." Plaintiffs' Brief p. 25.

"... differences between purchasers go to the amount of
damages." Plaintiffs' Brief p. 32.

"... and purchasers of contract hardware therefore not
damaged." Plaintiffs' Brief p. 32.

"... the Overcharges to Plaintiffs who Purchased Contract
Hardware for Master Keyed Projects." Plaintiffs' Brief
p. 45.

"There is no question that plaintiffs--as purchasers of con-
tract hardware--are within the 'target area' of the illegal
agreement. . . ." Plaintiffs' Brief p. 46.

And on these facts, this case cannot be distinguished from State of Illinois v. Ampress Brick Company, Inc. (N.D. Ill. 1975) 1975 Trade Cases 60,295. There, the State of Illinois (represented by plaintiffs' co-liaison counsel herein¹³) sought damages on behalf of a class of governmental entities for price fixing conspiracies by concrete block manufacturers.

The facts, as outlined by Judge Kirkland, are strikingly similar (p. 66,163):

"The concrete block produced by defendants is sold primarily to masonry contractors who submit bids to general contractors for the masonry portions of projects. The general contractors in turn bid on an entire building project."

Noting that plaintiffs were not purchasers of concrete block, the court found simply (p. 66,163):

"What these plaintiffs purchased were buildings: a package of goods and services of which concrete block was one component part." (Emphasis by the Court)

Plaintiffs advanced in Ampress the same argument made here, that the ultimate consumer of a price fixed product should have standing to sue because the ultimate consumer bears the burden of the antitrust violation. Judge Kirkland, following analysis of Hanover Shoe, Inc. v. United Shoe Machinery (1968) 392 U.S. 41 and its progeny divided potential plaintiffs into three types (p. 66,1655):

13. See 1975 Trade Cases ¶60,294.

- (1) "The first is an immediate consumer (direct purchaser) who usually acts as a middleman, reselling either the same goods or a refined product to another consumer." (Emphasis by the Court)

Here, the immediate consumer or direct purchaser is the contract hardware dealer.

- (2) "The second is a final consumer, who obtains goods from the manufacturer or from a subsequent consumer, but who in either case acquires the goods in the same condition as originally made and sold by the manufacturer." (Emphasis by the Court)

Here, the final consumer is the general building contractor.

- (3) "The last type of consumer is an ultimate consumer who obtains a finished product from a middleman that has altered or added to the goods received from the manufacturer. There are, then, two different types of indirect consumers: the final consumer and the ultimate consumer." (Emphasis by the Court)

Acknowledging that the immediate consumer unquestionably has standing and that the final consumer may have standing, the Court points out (p. 66,166):

"Acceptance of the ultimate consumer as plaintiff in an antitrust action has been less enthusiastic. One of the few cases to grant standing to an ultimate consumer is In Re Master Key Antitrust Litigation . . ."

After review of controlling authority in the Seventh Circuit, Judge Kirkland declared (p. 66,166):

"This Court therefore holds that, as to ultimate consumers, their injuries are too remote and inconsequential to provide legal standing to sue against the alleged antitrust violator."

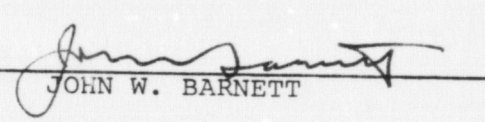
The teaching of Ampress can be directly applied here. Plaintiffs are ultimate consumers---not purchasers or even indirect purchasers---and should be denied standing to assert claims for antitrust damages. Certainly well established authority gives plaintiffs the right to proceed to trial on the issue of whether "liability" for antitrust violation can be shown by generalized proof of injury.

Defendants respectfully request that the cases be returned to the District Court with directions to reconsider its orders of May 27, 1975, in light of the legal requirement for proof of impact.

Respectfully submitted,

EATON CORPORATION
SARGENT & COMPANY
ILCO CORPORATION

By


JOHN W. BARNETT

Dated: September 29, 1975

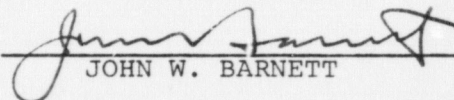
Walter A. Bates
M. Neal Rains
Arter & Hadden
1144 Union Commerce Building
Cleveland, Ohio 44115
Counsel for Eaton Corporation

John W. Barnett
Shaun S. Sullivan
William H. Prout, Jr.
Wiggin & Dana
P. O. Box 1832
195 Church Street
New Haven, Connecticut
Counsel for Sargent & Company

Charles Donelan
James E. Wallace, Jr.
Bowditch & Lane
311 Main Street
Worcester, Massachusetts
Counsel for Ilco Corporation

CERTIFICATION

I, JOHN W. BARNETT, do hereby certify that I have
on this 29th day of September, 1975 mailed, postage prepaid,
a copy of the foregoing Reply Brief of Defendants-Appellants
to counsel on the attached service list of counsel.


JOHN W. BARNETT

SERVICE LIST OF COUNSEL

Walter A. Bates, Esq.
Arter & Hadden
1144 Union Commerce Building
Cleveland, Ohio 44115

Charles Donelan, Esq.
Bowditch & Lane
311 Main St., Suite 200-300
Worcester, Massachusetts 01608

Gerard J. Dwoling, Esq.
Assistant Attorney General
State of Connecticut
30 Trinity Street
Hartford, Connecticut 06106

Lee A. Freeman, Jr., Esq.
Freeman, Freeman & Salzman
One IBM Plaza - Suite 3200
Chicago, Illinois 60611

Gerry J. Elman, Esq.
Deputy Attorney General
Capitol Annex
Harrisburg, Pennsylvania 17120

H. Laddie Montague, Jr., Esq.
David Berger, P.A. Attorneys at Law
1622 Locust Street
Philadelphia, Pennsylvania 19103

Edward B. Bergman, Esq.
Deputy City Solicitor
City of Philadelphia
15th Fl., Municipal Services Bldg.
Philadelphia, Pennsylvania 19107

Frederic B. Burns, Esq.
Sager & Burns
Suite 300 Bank of Kendall Bldg.
3603 S. Dixie Highway
Miami, Florida 33143

Evan Davis, Esq.
Antitrust Division
Corporation Counsel
Law Department, New York City
Municipal Building
New York, New York 10007

Frederick D. Steinhardt, Esq.
1503 Ford Building
Detroit, Michigan 48226

Michael B. Lewiston, Esq.
Bodman, Longley, Bogle,
Armstrong & Dahling
1400 Buhl Building
Detroit, Michigan 48226

Ronald I. Wiseman, Esq.
Attorney General's Office
Antitrust Section
30 E. Broad St., 15th Floor
Columbus, Ohio 43215

William F. Hyland, Attorney General
Bruce R. Volpe, Dep. Atty. General
State House Annex
23 West State Street
Trenton, New Jersey 08625

Richard H. Saylor, Esq.
Antitrust Division
U.S. Department of Justice
Washington, D. C. 20530

John F. Beckman, Jr., Esq.
Special Deputy Atty. Gen. of Ind.
Tinkham, Beckman, Kelly & Singleton
5900 Hohman Avenue
Hammond, Indiana 46320

Chauncey H. Browning, Jr., Esq.
Attorney General
State Capitol
Charleston, West Virginia 25305

Perry Goldberg, Esq.
203 S. LaSalle St. #1130
Chicago, Illinois 60604

Harold J. Lessner, Esq.
Assistant Attorney General
The State of Wisconsin
Department of Justice
Madison, Wisconsin 53702

Joseph D. Landi, Esq.
Assistant Attorney General
Anti-Monopolies Bureau
Room 4636, 46th Floor
Two World Trade Center
New York, New York 10047

Warren Spannaus, Attorney General
Thomas R. Much, Special Asst. Atty.
General - State of Minnesota
Department of Justice
St. Paul, Minnesota 55100

J. F. Steineger, Jr., Esq.
Special Assistant Attorney General
Steineger and Reid
Two Gateway Center, Suite 201
Kansas City, Kansas 66101

Frank J. Kelley, Attorney General
State of Michigan
525 West Ottawa
Lansing, Michigan 48913

Ralph C. Dixon, Esq.
Richard M. Reynolds, Esq.
Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103

Evelle J. Younger, Attorney General
Warren J. Abbott, Assistant Attorney General
William S. Abbey
H. Chester Horn, Jr.
Deputy Attorneys General
3530 Wilshire Boulevard, Rm. 300
Los Angeles, California 90010